No. 229

Brief of Farrar, Jonas & Lazarus for D'ft

SUPREME COURT OF THE UNITED STATES.

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OCTOBER TERM, 1899.

WILLIAM O. GLASS,

Plaintiff in Error,

versus.

THE POLICE JURY OF THE PARISH OF CONCORDIA,

Defendant in Error.

Brief in Behalf of Defendant in Error.

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BENJAMIN T. JONAS,
ERNEST B. KRUTTSCHNITT,
HENRY L. LAZARUS,
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STATEMENT.

Matthew Carr was a resident citizen of the State of Louisiana. He owned, at the time of his death, warrants or orders for levee work, drawn by the levee engineer on the treasurer of the Parish of Concordia, a municipal corporation of the State of Louisiana. His succession was administered in the Probate Court of the Parish of Concordia, where he was domiciled at the time of his death. An administrator was appointed, who was also a citizen of the State of Louisiana. A sale of the property of Carr was made under the order of the Probate Court by the sheriff of the parish of Concordia. At this sale William C. Glass, who was then, and who still remains, a citizen of the State of Missouri, bought the warrants in question. He thereafter filed suit in the United States Circuit Court for the Eastern District of Louisiana against the parish of Concordia, declaring upon the said warrants. This suit

was brought while the Act of 1875 was in force. On June 17, 1898, an amended petition was filed, and to the original and this amended petition defendant filed a plea to the jurisdiction, on the ground that the suit was brought upon a chose in action, acquired by the plaintiff from a citizen of the State of Louisiana, on which chose of action the original holder could not sue in the United States Circuit Court. The court below maintained the plea and dismissed the petition.

Argument.

The issue in this case is very narrow. It is stated on page 3 of appellant's brief as follows:

"We concede that neither Carr, his heirs, nor the administrator of his estate, nor the sheriff who made the sale, nor the judge who ordered the sale, possessed the necessary citizenship to sue on the warrants in the Circuit Court, at the time this action was brought. But we assert on principle that a purchaser at a sale made by authority of a Probate Court derives title from none of these sources, but takes title by the adjudication of the law acting directly *in rem* upon the property itself."

The prohibition on the jurisdiction of the Federal Courts in the judiciary act of 1789 was as follows:

"That no District or Circuit Court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless suit might have been prosecuted in such court to recover the said contents, if no assignment had been made."

The prohibition contained in the act of March 3, 1875, is as follows:

"Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in case of promissory notes negotiable by the law merchant, and bills of exchange.

This language covers all assignments. This point was settled at a very early day, under the Act of 1789, in the case of Sere

vs. Pitot *et al.*, 6 Cranch, 332, decided by Chief Justice Marshall. In that case the assignment had been made to a syndic for the benefit of creditors, under the law of Louisiana, and the Court held that such assignment did not give the Court jurisdiction. Judge Marshall said, page 336:

"The circumstance that the assignment was made by operation of law, and not by the act of the party, might probably take the case out of the policy of the act, but not out of its letter and meaning. The Legislature has made no exception in favor of assignment so made. It is still a suit to recover a chose in action in favor of an assignee, which suit could not have been prosecuted if no assignment had made; and is, therefore, within the very terms of the law. The case decided in 4 Cranch was on a suit brought by an administrator, and a residuary legatee, who were both aliens. The representatives of a deceased person are not usually designated by the term assignee, and are, therefore, not within the words of the act."

This case was referred to with approval by Chief Justice Fuller in rendering the opinion of the Court in Mexican National Railroad Company vs. Davidson, 157, United States, p. 205.

The claim presented by the counsel in this case has never been urged during the 111 years that the Courts of the United States have been in operation, under the prohibitions aforesaid.

Following the principle laid down by Chief Justice Marshall in Sere vs. Pitot, *supra*, it has been held that heirs, legatees, administrators, executors and receivers, are not assignees in law or in fact, and are, therefore, not within the prohibition of the statute. But there is no case in the books, and no principle stated in any case in the books, which declares that the purchaser at a judicial sale, whether made by a probate court or made by a court of ordinary jurisdiction in the execution of a writ of *fi. fa.*, takes the property purchased by operation of law, and that he is not an assignee.

The right to appeal to the courts to enforce a contract, and

the right to lay the process of the Court upon the property of the debtor to enforce the contents of a contract are necessary elements of every legal contract. The elements of every legal right are: 1. An active subject; 2. A passive subject; 3. An object, and 4. The *vinculum juris*.

It is in recognition of these elements that this Court has again and again declared that any legislative action which tends to take away, or materially impair, the remedy given by law to enforce a contract, at the time it was made, is an impairment of the obligation of the contract under the Constitution of the United States.

When a man is alive and refuses to pay his debts, judgment is obtained against him on those debts, process issues under the judgment, the executive officer of the Court levies upon his property, advertises it for sale, adjudicates it to the purchaser, and makes the purchaser a deed therefor. Such a sale transfers the title of the debtor to the purchaser. The officer of the Court is the mere agency by which the title is transferred with the implied consent of the judgment debtor, which consent was necessarily contained in the contract by which his debt was created. The judgment debtor in such a sale is the warrantor of the title so transferred, and in case the purchaser is evicted, he can recover the price paid from this judgment debtor. This is undoubtedly the law of Louisiana, where warranty is of the nature of all sales, voluntary as well as judicial, and is only excluded by express covenant.

If a debtor in Louisiana dies, his title is instantaneously vested in his heirs under the maxim, *le mort saizit le vif*, as appears from the following articles of the Revised Civil Code of Louisiana:

"Article 940. A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.

This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees.

Article 941. The right mentioned in the preceding article is acquired by the heir by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it.

Thus children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seized of the succession, though they be merely seized of right and not in fact.

Article 942. The heir being considered seized of the succession from the moment of its being opened, the right of possession which the deceased had continues in the person of the heir, as if there had been no interruption, and independent of the fact of possession.

Article 943. The right of possession, which the deceased had, being continued in the person of his heir, it results that this possession is transmitted to the heir with all its defects, as well as all its advantages, the change in the proprietor producing no alteration in the nature of the possession.

Thus the extent of the rights of the deceased regulates those of the heir, who succeeds to all his rights which can be transmitted, that is, to all those which are not, like usufruct, attached to the person of the deceased.

Article 944. The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case he was ignorant that the succession was opened in his favor.

Article 945. The second effect of this right is to authorize the heir to institute all the actions, even possessory ones, which the deceased had a right to institute, and to prosecute those already commenced. For the heir, in everything, represents the deceased, and is of full right in his place as well for his rights as his obligations."

Under the law of Louisiana, no title to any asset of a decedent passes to his executors or administrators. The title is at all times and under all circumstances in the heir, whoever or wherever he may be, even without his knowledge and against his will. The executor and administrator are given by law a fictitious seizen or right of possession which is paramount to that of the heir, for the purposes only of administering the estate.

Administrators under the law of Louisiana are appointed only where the heirs, or some of them, accept, with benefit of inventory, either in law or in fact, or where the creditors of the estate demand such appointment, on the refusal of the heirs, who have accepted purely and simply, to give security for the debt of their *de cujus*. See Civil Code of Louisiana, Articles 1032 *et sequenter*.

The statement made by counsel on pages 4 and 5 of his brief that proceedings in the probate courts of the State of Louisiana for the sale of property are proceedings *in rem* is an error, and the case quoted of Simmons vs. Saul (138 U. S., p. 439) does not hold any such doctrine.

It therefore appears that when the counsel says in the quotation above given that a purchaser at a sale made by authority of a probate court derives title neither from the heirs nor the administrator of his estate, he is fundamentally mistaken.

Nor is there any legal force in the further statement contained in that quotation to the effect that such purchaser "takes title by the adjudication of the law acting directly *in rem* upon the property itself." The only cases of proceedings *in rem*, where the action is against a thing itself, are proceedings in admiralty and proceedings for the forfeiture of certain offending things under the police laws of the various States.

Again, a judicial assignment is a necessary element of any judicial sale. Such a sale must be accompanied by the consent of the vendor (in such case that of the sheriff acting as the legal agent of the heirs), and the consent of the vendee, uniting upon the price and the thing to be sold, and in evidence of this consent a formal deed is executed.

Under the law of Louisiana a sheriff or auctioneer who sells property under the order of a court is required to make a *proces verbal* of such sale in the presence of two witnesses, and such *proces verbal*, when so signed by the sheriff or the auctioneer and the two witnesses, constitutes authentic evidence of the sale. If Glass in this case were called upon at the trial to prove his title it would be necessary for him to exhibit either the *proces verbal* of the sheriff's sale to him,

or a notarial act confirming such sale, signed by the representative of the succession and accompanied by the *proces verbal* as an exhibit.

Under these circumstances, we submit that it is to juggle with words to say that the title of the heirs of a descendant is transferred to a purchaser at a probate sale of the property of their *de cujus* by operation of law, and that any such title is devolved in the same manner as the law devolves title by its own operation upon an executor, an administrator, an heir, a legatee, or a receiver.

We believe that the judgment below was correct and should be affirmed.

Respectfully submitted,

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